

NHSR5

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Dear Ms Wilkins

Consultation - Proposed NHS Redress (Wales) Measure

Thank you for the opportunity to respond on the principles of the proposed NHS Redress (Wales) Measure 2007. This is a joint response by the Welsh Secretary of the British Medical Association in Wales, Dr Richard Lewis and the Chair of the BMA's Welsh Council, Dr Tony Calland.

We are happy for BMA Cymru Wales' response to be made public and Dr Tony Calland has already agreed to give additional oral evidence to the Committee.

General principles

1. Why is a Redress Scheme required?

The British Medical Association is deeply concerned about the social injustices of the present tort-based system. The BMA has called for adequate arrangements to provide appropriate and timely compensation and support to those who suffer personal injury through medical mishap.

The prospect of the patient receiving appropriate compensation when injury has been suffered is at present extremely uncertain and, when achieved, may involve many years of stressful legal action, causing enormous expense. For patients not eligible for legal aid, the risk of serious financial damage if the action is unsuccessful often compels them to abandon all hope of compensation and not proceed with a claim.

The present tort-based procedures destroy the proper relationship between patient and doctor, introducing a confrontational element, totally foreign to the mutual trust which should exist. Adversarial procedures encourage a lack of openness and frankness on the part of the doctor, just when it is most undesirable.

There is increased concern about recent trends in medical litigation. The position has worsened rather than improved since the Pearson Commission in 1978 declared that "... the tort system is too costly, too cumbersome, too prone to delay and too capricious in its operation to be defensible." (Report of the Royal Commission on Civil Liability and Compensation for personal Injury, Chairman: Lord Pearson, Cmnd 7054-I, 1978, paragraph 1715.)

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Welsh Secretary: Dr Richard JP Lewis, CSU MB ChB MRCGP Dip IMC RCS (Ed)
Chief Executive/Secretary: Tony Bourne

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NHS expenditure on clinical negligence was £503m in 2004/05, an increase over the 1999-2000 expenditure of £373m. The continued growth of conditional or contingency legal fees and other means of funding litigation have undoubtedly contributed to an increase in the cost of clinical negligence cases.

The dilemma has been to identify a process which would be fairer, limit exposure to large settlements, trade off cost savings against quicker awards but not leave the service open to those who might be encouraged to pursue a 'costless' but inappropriate case.

A clear, accountable redress system is required to help patients avoid the costs, stress and delays of going through the legal system. Any scheme should enable relatively small claims to be settled more quickly and fairly, and to the satisfaction of patients, doctors and the NHS.

The need for change to the existing tort-based system for settling cases of medical mishap arises from a number of standpoints and for a number of reasons:

From the patient's viewpoint - because of the length of time taken to resolve such cases - an average of over six years from issue of proceedings to conclusion - and the resistance of defendants to earlier settlement even where the case is clear cut;

From the doctor's viewpoint - because cases with little justification or hope of success are pursued with legal aid with often adverse consequences for both reputation and future clinical practice;

From the point of view of the NHS - because the costs incurred are often disproportionate to the settlement itself. It is sometimes alleged that pressure to contain cost often prompts inappropriate out-of-court settlements.

2. Does the proposed Measure achieve the policy objective?

In theory, the proposed Measure should achieve the policy objective. It will give powers to require providers or commissioners of services to consider settling lower value clinical negligence claims without recourse to legal proceedings.

However, the difficulty lies in the fact that The NHS Redress (Wales) Measure is an enabling piece of legislation. The specific detail of the scheme will follow in statutory instruments.

Without having sight of the specific details, BMA Cymru Wales is not in a position to provide a positive answer as to whether the detailed proposals will achieve the objectives set out in the Measure.

3. What are the views of stakeholders who will have to work with a redress system?

The British Medical Association (BMA) is a registered trade union and professional association representing doctors from all branches of medicine. BMA Cymru Wales represents the views of some 6,000 doctors in Wales.

The BMA's policy is to support a no fault compensation scheme. While we appreciate that the proposed measure is seeking to address inadequacies in the current tort-based system it is impossible to give meaningful views without sight of the detailed proposals on the operation of the scheme.

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At this early stage our three major concerns are:

1. Lack of detail. BMA Cymru Wales is unable to make a full and objective assessment of the implications of the Measure for our members given the fact that there is little, if any, specific detail as to how the scheme will operate.

2. Contractor status. Whilst we note that the Measure applies to hospital and specialised commissioned care, we regard with concern that the regulations are "wide enough to apply to NHS Redress arrangement to primary care." (Page 10, 5,8).

As the Explanatory Memorandum notes the indemnity arrangements for GPs, dentists, opticians and pharmacists are different. The professional indemnity arrangements work effectively and there is little, if any, reason for this to change.

In addition, the current indemnity arrangements means that the current financial burden rests with private insurance companies and places little, if any, burden on the public purse. If the system was to be extended then we would expect that this burden would subsequently shift to the public sector. In this context, it is our view that GPs should be excluded from this Measure.

3. Unintended consequences for both reputation and future clinical practice. BMA Cymru Wales is deeply concerned about the possible unintended consequences for doctors.

The new Redress scheme would operate on the assumption that there is liability on the part of the clinician and any investigation is based on this principle, creating potential conflict between redress and clinical governance. This is of particular relevance given the current moves towards revalidation.

Without the details of how this will operate in practice it is difficult to see how these issues will be satisfactorily resolved and sufficient safeguards for the practitioner incorporated within the proposal. Unless these issues are specifically addressed there may be unintended adverse effects on both the reputation and future clinical practice for doctors.

Detailed questions:

4. What will be the practicalities of making the system work and does the proposed Measure make provision for these?

Making the system work will require doctors and patients to have clarity about exactly what the Measure will achieve. In the absence of the specific detail it is extremely difficult to assess how the system will work.

~~We will have to~~ await the detail of the Statutory Instruments before any assessment of whether the system will work in practice.

As much of the detail of how the scheme will operate will be outlined in secondary legislation, clarification is needed on various issues, including the following:

It is claimed that the NHS Redress Scheme is expected to increase spending on compensation payments because it will bring new claims into the system. In the longer term however, savings on legal costs are expected.

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Under the proposed scheme, its operators will still need to establish whether or not there has been a breach of a duty of care in connection with the diagnosis of illness, or the care or treatment of a patient following any act or omission by a healthcare professional.

What criteria will be used to establish whether the cause of an individual's injury is from negligence? Who is going to advise people whether they are eligible to enter into the redress scheme?

Who will be appointed to evaluate eligibility of applications under the scheme? How will any experts appointed be selected?

There is no indication of what level the upper or low limit of compensation will be. The BMA calls for greater clarification on how the compensation system will work in practice, for example:

What proportion of claims settled currently through the legal system amount to any proposed upper-limit?

What mechanisms will be put in place to avoid double jeopardy?

Would any proposed limit exclude costs such as legal fees? Are remedial treatment costs included within this figure?

Where remedial treatment is required, what mechanism will there be to ensure that the treatments and/or rehabilitation are provided to the claimant?

There is no reference in the Measure for an appeals mechanism should the claimant disagree with the decisions made under the scheme, such as whether or not the claimant is entitled to redress under the scheme, or the level of the compensation offered.

What mechanisms will be in place to deal with such appeals?

The most expensive legal claims brought against the NHS are birth injury cases. These produce settlements of up to £5m and cost millions of pounds a year in legal fees. (*Handling Clinical Negligence Claims in England*, NAO, May 2001)

Can examples be provided of the type of cases that the scheme will cover?

Has there been any estimate of the number of cases that will fall within the remit of the redress scheme that avoid a claimant having to use the legal system?

The BMA is also concerned about the possibility of different redress schemes operating in different parts of the UK. There needs to be clarification as to the process by which redress will be claimed should clinical negligence occur when an NHS commissioner in Wales refers a patient for treatment to a provider across the border in England, and where cases have any cross border implications.

5. Is it appropriate that so much be done by regulations i.e the details of any scheme will be decided by Welsh Ministers?

It is appropriate for the specific detail to be made by regulation. It will provide clarity and uniformity for an all-Wales redress system.

However, if these regulations are going to gain the support of doctors it is essential that the details are developed in full consultation with all key stakeholders.

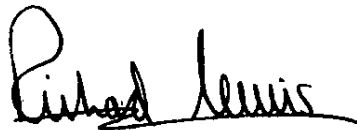
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6. The Measure relates to the redress in relation to liability in tort, i.e where some fault is established without recourse to the courts. Would it be better for the Assembly to seek the power from Westminster to introduce a 'no-fault scheme'?

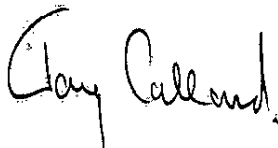
BMA policy supports a no fault system of compensation, with maximum financial limits, set in all sectors of the NHS.

In line with our policy, BMA Cymru Wales would support the Welsh Assembly Government seeking additional power from the UK Government to introduce a no fault system of NHS redress in Wales.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Richard Lewis". The signature is written in a cursive style with a long horizontal stroke at the end.

Dr Richard Lewis
BMA Welsh Secretary

A handwritten signature in black ink, appearing to read "Tony Calland". The signature is written in a cursive style with a long horizontal stroke at the end.

Dr Tony Calland
Chair, BMA Welsh Council